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No. 85-1392

In the

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD PULLUM, APPELLANT

v.

CINCINNATI, INC., ETC., ET AL., APPELLEES

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL REPLY BRIEF

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TABLE OF CONTENTS

Page

INTRODUCTION 1

THE REPLY 1

CONCLUSION 8

TABLE OF AUTHORITIES

Cases: Page

Ashton v. Kentucky, 384 U.S. 195, 86 S. Ct. 1407, 16 L.Ed.2d 469 (1966) 4

Battilla v. Allis Chalmers Manufacturing Co., 392 So.2d 874 (Fla. 1980) ..... passim

Bouie v. City of Columbia, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964) 5

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S. Ct. 451, 74 L.Ed. 1107 (1930) 5

Cassidy v. The Firestone Tire and Rubber Company, Case No. 68,160 (Jan. 21, 1986) 4

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971) 5, 7, 8

Davis v. Artley Const. Co., 18 So.2d 255 (Fla. 1944) 5, 7

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L.Ed. 360 (1932) 5

Green v. Louisville & Interurban R. Co.
244 U.S. 499, 61 L.Ed. 1280, 37 S. Ct. 673, Ann. Cas. 1917E, 88 3

Lawrence v. State Tax Commission, 286 U.S. 276, 52 S. Ct. 556, 76 L.Ed. 1102 (1932) 3

Linder v. Combustion Engineering Company, 342 So.2d 474 (Fla. 1977) 7

Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983) 3, 4, 6

New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184 (1928) 6

Ostendorf v. Turner, 426 So.2d 539 (Fla. 1982) 2

Pullum v. Cincinnati, Inc., 476 So.2d 657 (Fla. 1985) 2, 4, 5, 6

Smith v. Cahoon, 283 U.S. 553, 75 L. Ed. 1264, 51 S. Ct. 582 (1931) 3, 4, 5

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 22 L.Ed.2d 572 (1969) 6

West v. Caterpillar Tractor Co., Inc., 336 So.2d 80 (Fla. 1976) 7, 8

Zobel v. Williams, 457 U.S. 55, 102 S. Ct. 2309 72 L.Ed.2d 672 (1982) 1, 2, 5

Other Authorities:
28 USC § 1257(2) 3, 6

Federal Practice and Procedure, 1985 Supplement, Section 4022 (Wright) 3

Restatement (Second) of Torts § 402A 7

INTRODUCTION

The essence of this appeal: a substantial valid federal equal protection challenge stands rejected but unanswered. The challenge was presented (appellees admit this). The challenge was valid (no one suggests that discriminating against victims of 8 to 12 year-old defective products is more rational or serves a more legitimate state purpose than the invalid statute that discriminated based on when people moved to Alaska. *Zobel v. Williams,* 457 U.S. 55, 65, 102 S. Ct. 2309, 2315, 72 L.Ed.2d 672, 681 (1982). The challenge was rejected (the summary judgment was affirmed). The challenge remains unanswered (to quote appellees, page 11: "Nowhere in its opinion did the Florida Supreme Court address, expressly or by clear implication, the federal equal protection question.").

This appeal presents two basic, significant, propositions: ONE — those who make substantial federal equal protection challenges in American courts have a right to have those challenges evaluated and answered; and TWO — state courts may not evade substantial valid federal equal protection challenges by purporting to eliminate them retroactively. Appellees' ignore these undeniable principles; hence, this reply.

THE REPLY

The platitudes served up by appellees neither enlighten the debate, lessen the error, nor undercut the reasons why this Court should decide this case. Nevertheless, we deal with them, one-by-one, in order.

Pages 1 and 2. Appellees' claim: "Nowhere in its opinion did the Florida Supreme Court acknowledge a valid equal protection argument." Reply: Then why did the court reject the certifying court's opinion and explicitly say:

> *Since* we have receded from *Battilla,* it logically *follows* that section 95.031(2) does not deny equal protection.

> This is so because the classification *originally* established by the statute bears a rational relationship to a proper state objective. In receding from *Battilla, we* have eliminated the premise of Pullum's equal protection argument.

Pullum v. Cincinnati, Inc., 476 So.2d 657, 660 (Fla. 1985) (emphasis supplied). Plainly, the court understood that the summary judgment against Pullum resulted from the amended statute's irrational and purposeless discrimination.

Pages 2-5. The "Motion to Affirm". Appellees' claim (page 4): The statute *before* amendment by *Battilla* did not deny equal protection. Reply: This claim is irrelevant; Pullum challenged the *amended* statute's irrational, purposeless discrimination against victims of pre-teen defective products.

Appellees' claim (page 4): Appellant conceded that the statute did not deny him his right of access to the courts. Reply: This, too, is irrelevant; the amended statute *did* deny him equal protection and *that* was, has always been, and remains the point.

Pages 5 and 6. The "Motion to Dismiss — Lack of Jurisdiction". Appellees' claim: Pullum lacks "standing". Reply: This is the proverbial red herring. Richard Pullum's 14th Amendment right to equal protection has been brushed aside. He has standing — in this Court.

Pages 7-10. The "Motion to Dismiss — Independent and Adequate Non-Federal Grounds". Appellees' claim (page 7): The opinion "does not mention anything about the federal equal protection challenge asserted by the Appellant." Reply: Apparently appellees mean to suggest that, notwithstanding our reliance on *Zobel v. Williams,* on which the Florida Court had recently relied in *Ostendorf v. Turner,* 426 So.2d 539, 544-45 (Fla. 1982), the time-pressed court simply overlooked the 14th Amendment. Even if this were true, such an oversight by a state court would not defeat this Court's jurisdiction

to decide a federal constitutional challenge to a state statute. An erroneous failure to pass on such a federal challenge is treated as equivalent to a finding of validity within the meaning of 28 USC § 1257(2). This Court has declared that constitutional rights are denied

> by the refusal of the state court to decide the question, as by an erroneous decision of it, see *Green v. Louisville & Interurban R. Co.* 244 U.S. 499, 508, 512 et seq., 61 L. ed. 1280, 1285, 1287, 37 S. Ct. 673, Ann. Cas. 1917E, 88; *Smith v. Cahoon,* 283 U.S. 553, 564, 75 L. ed. 1264, 1272, 51 S. Ct. 582, for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked.

Lawrence v. State Tax Commission, 286 U.S. 276, 282-83, 52 S. Ct. 556, 558, 76 L.Ed. 1102, 1107 (1932).

But, the Florida court did not overlook the federal challenge. Instead, the court recognized it (and its validity), yet improperly attempted to retroactively eliminate it. It is this point our opponents decline to debate.

Appellees' claim (pages 7-10): In varying ways appellees say the Florida court decided the case on state equal protection grounds, i.e., they argue again that the pre-*Battilla* statute did not deny equal protection. Reply: Our opponents continue to miss the point, or intend to obfuscate it. *Battilla* amended the statute. Pullum challenged the statute *as amended.* No one says the amended statute met any equal protection standard under any constitution anywhere.

A further point: appellees' reason for citing Wright, *Federal Practice and Procedure,* 1985 Supplement, Section 4022 at 440 (1977) is indecipherable. The cited section simply confirms this Court's jurisdiction and leads one to read *Michigan v. Long,* 463 U.S. 1032, 1041, 103 S. Ct. 3469, 3476, 77 L.Ed.2d 1201, 1205 (1983), which reiterated a point epitomized by the *Pullum* opinion:

> . . . ambiguous or obscure adjudications by state courts

do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.

Justice Stevens' dissent also supports jurisdiction here since "in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard". *Id.*, 103 S. Ct. at 3490 (emphasis in original). Although the Florida court purports to have eliminated the premise of Pullum's equal protection argument, the decision cannot begin to do that unless it retroactively eliminates the vested rights of those whose causes of action came into being under the protection of the *Battilla*-amended statute. However, the Florida court has specifically been asked, does not know, and consequently has refused to say whether *Pullum* is even *intended* to be retroactive. *Cassidy v. The Firestone Tire and Rubber Company*, Case No. 68,160 (January 21, 1986)(App. 37a)(Appellees' App. 41a). This well illustrates the ambiguity and obscurity of the *Pullum* opinion.

Moreover, a half century ago this Court taught Florida's supreme court a key lesson in equal protection. In *Smith v. Cahoon, supra*, the Florida court, by statutory construction, attempted to skirt a 14th Amendment challenge to a statute which, like the amended statute here, made a classification "not based on anything having relation to the purpose for which it is made." 283 U.S. at 567, 51 S. Ct. at 587. This Court reversed; the challenger was entitled to assert his constitutional right by virtue of the invalidity *as of the time* the statute was applied to him. 283 U.S. at 565, 51 S. Ct. at 586; *accord, Ashton v. Kentucky*, 384 U.S. 195, 199, 86 S. Ct. 1407, 1409, 16 L.Ed.2d 469, 471, (1966). Today's Florida court has forgotten this lesson.

In *Smith v. Cahoon* this Court gave another reason for reversing the Florida court's belated attempt to give the invalid statute a saving construction:"The decision thus aims to remove the constitutional objection of invalid application

only by creating another constitutional objection . . . ." 283 U.S. at 565, 51 S. Ct. at 586. Just so, in *Pullum* the Florida court's deunconstitutionalization of the amended statute could not retroactively eliminate vested *Battilla*-born rights of action without violating due process. *Chevron Oil Co. v. Huson,* 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296 (1971); *Davis v. Artley Const. Co.,* 18 So.2d 255, 259 (Fla. 1944); *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 681-682 n.8, 50 S. Ct. 451, n.8, 74 L.Ed. 1107, 1114 n.8 (1930); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 53 S. Ct. 145, 148, 77 L.Ed. 360, 366 (1932); *Bouie v. City of Columbia,* 378 U.S. 347, 354-355, 84 S. Ct. 1697, 1703, 12 L.Ed.2d 894, 900-01 (1964).

Appellees' brief repeatedly demonstrates that the ambiguous and obscure Florida adjudication is being used (as was the similar adjudication 55 years before in *Smith v. Cahoon)* as an attempted barrier to this Court's determination of the 14th Amendment equal protection challenge.

Pages 10-12. The "Motion To Dismiss — No Federal Question". Appellees' claim (page 12): Summarizing, appellees say: "Appellee contends that Appellant did not raise a federal question which was presented and considered and decided by the Florida Supreme Court . . . ." Reply: Are their *no* bounds to appellees' attempt to preserve the windfall handed them by the Florida court? Appellees know we raised the federal equal protection challenge at each level below. The trial court recited it (Jurisdictional Statement at 5 and 6; App. 17a; Appellees' App. 21a). We repeated it in both the district and supreme courts, and there relied on this Court's decision in *Zobel v. Williams.* Here is the title to the Argument section of our initial brief in the Florida supreme court:

> THE ACCESS TO COURTS GUARANTEE OF THE FLORIDA CONSTITUTION HAS SO ALTERED SECTION 95.031(2) THAT ITS ONLY REMAINING

MEANS OF APPLICATION VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Thus, the federal equal protection challenge was put squarely before Florida's supreme court. *Street v. New York,* 394 U.S. 576, 583-84, 89 S. Ct. 1354, 1361-62, 22 L.Ed.2d 572, 579-580 (1969); *New York ex rel Bryant v. Zimmerman,* 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L.Ed. 184, 187 (1928). It is frivolous for appellees to suggest otherwise. The Florida court merely used the equal protection violation as an entree to a reconsideration of *Battilla.* The defect in the court's after-the-fact approach is that the nonretroactivity of *Pullum* prevents the court from having "eliminated the premise of Pullum's equal protection argument."

Pages 13-16. The "Motion to Dismiss — Other Grounds". Appellees' claim (paragraph 2, page 13): The Florida court rejected the contention that it did not eliminate the premise of the federal equal protection argument. Reply: Appellees contradict this by saying (page 14) "The language does *not* say that the *federal equal protection* premise had been removed." As we said in the jurisdictional statement, "The Federal Equal Protection Challenge Remains — Unresolved." It is ripe for decision.

Appellees' claim (page 14): The Florida court "based its decision on independent and adequate state equal protection grounds." Reply: If a state court holds a statute *un*constitutional under a stricter test set by a state equal protection clause, that is a basis for this Court's denying review. *Michigan v. Long.* But, when a federal equal protection challenge is made, and a state court upholds a statute under a less strict state test, this does nothing to answer or eliminate the federal challenge of which this Court is the final arbiter. Thus, when a state court *upholds* a state statute in the face of a federal equal protection challenge, this Court has jurisdiction. 28 USC § 1257(2).

Appellees' claim (pages 13-15): "Appellant proceeds to criticize the court unduly." Reply: While appellees protest the phrasing, they do not dispute the criticism itself. Please note that although appellees quote the analysis made on page 9 of the jurisdictional statement, they do not debate its accuracy. Nor do appellees deny that they, too, had accepted that *Battilla* was and would remain the law. To accurately criticize this surprise decision, which shocked and confused the Bench and Bar of Florida, is neither to be impertinent nor disrespectful, nor is it to question integrity.

More importantly, appellees ignore the real significance of the analysis: *Battilla* was a clear, unchallenged polestar decision which had applied the fundamental Florida constitutional guarantee of access to courts; the receding from this protector of that guarantee was not foreshadowed by any prior decision and constituted a sharp break in the web of the law. This bolt from the blue cannot be permitted to eliminate retroactively a valid federal equal protection challenge. To tolerate a "now you see it, now you don't" approach to equal protection would send the wrong signal to the state courts and would have a chilling effect on good faith challenges to denials of equal protection.

Appellees' claim (pages 15 and 16): Appellant "misstates the general rules concerning retroactive application of the court's decision." Reply: We stated, not general rules of retroactivity, but the specific rules governed by due process considerations when actions have been taken in reliance upon clear, unchallenged precedent. *Davis v. Artley Const. Co.*, 18 So.2d 255, 259 (1944); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L.Ed.2d 296, (1971). The case cited by appellees, *Linder v. Combustion Engineering Company*, 342 So.2d 474 (Fla. 1977), is completely inapposite. It dealt with the adoption, by name, of §402A strict products liability; *West v. Caterpillar Tractor Co., Inc.*, 336 So.2d 80 (Fla. 1976). Retroactive application there was legitimate since the adoption of §402A was quite foreseeable; indeed, in *West*, 336

So.2d at 86, the court noted it was merely putting old wine into a new bottle:

> We believe that the prior decisions of this Court are in conformity with the principles set forth in the Restatement (Second) of Torts §402A, quoted above. Such a recognition by the Court is no great new departure from present law and, in most instances, accomplishes a change of nomenclature.

No right thinking student of Florida law would say that the receding from *Battilla* was "no great new departure from present law."

Appellees' claim (page 16): "The Florida Supreme Court was not prohibited from changing a decision construing the constitutionality of a statute." Reply: This is why we said in the jurisdictional statement that Pullum does not quarrel *in this Court* with that court's right to reverse itself and change the rule *for the future.* Pullum's complaint here is that, at the time he suffered the summary judgment, he was without doubt denied equal protection and that, recognizing this, the Florida court purports to have retroactively eliminated his valid federal equal protection challenge, i.e., it reversed itself and changed the rule *for the past.* It bears repeating: In *Huson* this Court rejected "the fiction that the law now announced has always been the law." 92 S.Ct. at 356.

CONCLUSION

The protection of the 14th Amendment should be restored in this case. The Court should grant plenary review or summary reversal.

Respectfully submitted,

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